

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE BOARD OF EDUCATION INDEPENDENT SCHOOL  
DISTRICT NO. 38, RED LAKE, MINNESOTA

In the Matter of the Proposed  
Placement of James Lasley,  
Eldon Winge, Richard Phillips and  
Raymond Brown on Unrequested  
Leaves of Absense

FINDINGS\_OF\_FACT,  
CONCLUSIONS\_AND  
RECOMMENDATION

The above-entitled matter came on before Administrative Law Judge Phyllis A. Reha duly appointed as an Independent Hearing Examiner for the Board of Education, Independent School District No. 38 on May 10, 1991 at the School District Office in Red Lake, Minnesota. The record closed upon receipt of the last posthearing brief of the parties on May 29, 1991.

Appearing on behalf of the Independent School District No. 38, Red Lake, Minnesota was Margaret Seelye Treuer, Attorney at Law, 435 Swenson Road N.E., Bemidji, Minnesota 56601. Appearing on behalf of James Lasley and Eldon Winge was Bruce P. Grostephen of the law firm of Peterson, Engberg & Peterson, Attorneys at Law, 700 Title Insurance Building, Minneapolis, Minnesota 55401-2498. Appearing on behalf of Raymond Brown was Darrell D. Baty, Minnesota Education Association Field Representative, 516 Bunyan Drive N.W., Bemidji, Minnesota 56601. Richard Phillips did not contest his placement on unrequested leave of absense and did not attend the hearing.

This Report is a recommendation, not a final decision. The School Board of Independent School District No. 38, Red Lake, Minnesota, will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusion, and Recommendations contained herein. Pursuant to Minn. Stat. § 125.12, subd. 10, the School Board must issue a written decision and order. The parties have waived, on the record, the time constraints provided in subdivision 10. Parties should contact Ed Kroenke, Acting Superintendent of Independent School District No. 38, Red Lake, Minnesota to ascertain the date and time of the School Board meeting at which this recommendation will be considered and to ascertain the procedure, if any, for filing exceptions or presenting argument to the School Board.

STATEMENT OF ISSUES

The issues to be determined in this proceeding are as follows:

(1) Whether Independent School District No. 38, Red Lake, Minnesota (School District) has established that James Lasley, Eldon Winge, Richard Phillips and Raymond Brown may be placed on unrequested leaves of absense (ULA) due to discontinuance of positions, lack of pupils or financial limitations consistent with Minn. Stat. P 125.12, subd. 6b (1990); and

(2) Whether the School District's decision to place non-Indian teachers on ULA while retaining an American Indian teachers with less seniority was permissible pursuant to Minn. Stat. P 126.501 or constituted improper racial classification in violation of the Fourteenth Amendment to the constitution or state statutes barring discrimination on the basis of race or national origin.

#### FINDINGS OF FACT

1. James Lasley, Eldon Winge, Raymond Brown and Richard Phillips are teachers of Independent School District No. 38, Red Lake, Minnesota.

2. Independent School District No. 38 is a school district of the state of Minnesota and its boundaries are entirely within the Red Lake Indian Reservation.

3. All of the students of the School District are American Indian children and are enrolled or eligible for enrollment in the Red Lake Band of Chippewa Indians.

4. On April 8, 1991, the Board of Education of the School District passed resolutions proposing that each of the four teachers herein be placed on unrequested leaves of

5. Each of the teachers were duly served with written notice of the School Board's action and copies of the individual resolution affecting each of them. (District Exs. 1-4).

6. Each of the teachers requested a hearing. The parties agreed upon a hearing date of May 10, 1991.

7. The School District did not issue a Notice of Hearing as required by Minn. Stat. P 125.12, subd. 9. However, since the parties had agreed to a mutually satisfactory hearing date and the parties appeared at the hearing, these actions constitute a waiver of any procedural objection to the lack of hearing notice. The lack of hearing notice is found to be a technical, nonprejudicial error.

8. The master agreement between the School District and the teacher's bargaining unit was signed by the parties on December 4, 1989 and does not contain a negotiated plan for the placement of teachers on ULA. The agreement

does contain language relating to unrequested leave. However, this language essentially reiterates provisions of Minn. Stat. § 125.12, subd. 6b and provides a method for breaking ties in seniority. (Master Agreement, Article XIV, District Ex. 5).

#### Financial Limitations

9. The School District's general fund balance as of June 30, 1988, was \$613,643.00. (District Ex. 6, pages 7-9).

10. The School District's general fund balance as of June 30, 1989, was \$269,748.00. (District Ex. 7, pages 7-9).

11. The School District's general fund balance as of June 30, 1990, was \$-475,931.00. The School District's special revenue funds also had a negative balance of \$ -141,945 as of June 30, 1990 for a total deficit of \$-617,876. (District Ex. 8, pages 7-9).

12. The School District's auditor made a finding in the 1990 audit that the District was in statutory operating debt under Minn. Stat. § 121.914 which is a violation of Minn. Stat. § 121.917, subd. 2. (District Ex. 8, page 43).

13. On January 14, 1991 the School District received notice from Northern National Bank that its accounts at the bank were overdrawn and that credit which had been applied for was being denied. (District Ex. 9).

14. On January 17, 1991 the School District received notice from the Minnesota Department of Education that it was in violation of expenditure limitations. (District Ex. 10).

15. The School District is located on the Red Lake Indian Reservation where most of the land is non-taxable. Accordingly, the School District relies heavily on federal impact aid and other federal funds to fund its educational programs, rather than local property taxes.

16. Between fiscal years 1988-1990, the School District's general fund receipt from federal sources dropped significantly. The School District's audit for fiscal years 1988, 1989, and 1990 show federal general fund receipts as follows:

FY88:	\$2,497,966
FY89:	\$2,153,697
FY90:	\$2,221,794

17. Between fiscal year 1988 and 1990, the School District's expenditures for regular instruction increased. The School District's audits for fiscal years 1988, 1989, and 1990 show the following expenditures for regular instruction paid out of the general fund:

FY88: \$3,167,243

FY89: \$3,464,095

FY90: \$4,037,929

(District Exs. 6, 7, 8, pages 7-9).

18. The School District has estimated that it will have a total deficit of \$2,077,876 by June 30, 1991. This figure is an estimate and is based on unaudited calculations. (District Ex. 11). This estimate will be modified following a state audit at the end of the fiscal year which will adjust and correct the present school financial records. The parties stipulated to the fact that the School District is in severe financial problems because of mismanagement and misappropriation of funds by past school boards and administration.

19. Examples of mismanagement and/or misappropriation of funds includes the following:

a.

b. \$279,028.10 was spent on the Ponemah Building Addition during the 1990-91 school year when, no money was budgeted for the Ponemah Building Addition. The expenditures for the Ponemah Building were taken from the general fund when they should have been taken from the Expenditure fund. (Teacher Ex. 6, page 87).

c. For the 1990-91 school year, the School District spent \$690,765 on capital expenditures when it only had budgeted \$305,421 for capital expenditures. (Teacher Ex. 6, page 92).

d. School Board members and School District employees had been granted interest free loans from School District funds in substantial amounts.

e. As of April 10, 1991, the School Board had spent \$114,378.24 on its own salaries, travel and other expenses.

f. Duplicate payments have been made to vendors in the School District in the year ending June 30, 1990. (District Ex. 8, page 43).

g. The School District had issued checks without putting vendor's names on the check, one such check being issued in the amount of approximately \$100,000.

20. The new administration and School Board has proposed a plan to deal with the financial mismanagement problems identified and is committed to the following activities:

a. Undergo a state audit at the end of the 1991 fiscal year.

b. Adjust and correct present school financial records.

c. Reduce budget expenditures to present revenue levels.

d. Establish an accurate budget for fiscal year 1991 and 1992.

e. Prepare a three year plan to reach financial solvency.

f. Reorganize remaining resources in order to provide the best quality educational programs possible for the children in the Red Lake School District.

(District Ex. 11).

21. The School District's Board of Education discussed the financial problems of the School District on January 7, 1991; January 10, 1991; January 16, 1991; January 22, 1991; February 4, 1991; and March 11, 1991 and adopted a number of measures to immediately reduce expenditures. (District Exs. 1-19, 21, 23).

22. The School District has serious financial limitations which make it reasonable for the School District to consider making budget reductions, including teacher lay offs and discontinuance of programs.

#### Lack\_of\_Pupils

23. The financial resources of the School District are directly related to the student enrollment. The projected enrollment for the 1991-92 school year is between 1053 and 1062 students. The enrollment for the 1990-91 school year was 1004 students. Accordingly, the projected increase in enrollment for the 1991-92 school year is between 4.9 percent and 5.8 percent. (District Ex. 12 and Teacher Ex. 1).

24. Although the projections indicate an increase in enrollment in the School District, the District has experienced a decline in enrollment for students grade 7-12 between the 1987-88 school year and the 1990-91 school year. In 1987-88 there were 428 students in grades 7-12 and in 1990-91 there were 384 students in these grades. (District Exs. 12, 13 and testimony of E. Kroenke).

25. The School District receives more state aid per pupil for secondary students than it does for primary. Thus, declining enrollment in secondary students has a significant impact on the District's finances.

26. On January 7, 1991 and again on February 4, 1991, the School Board directed the School District Administration to make recommendations for budget reductions and discontinuance of programs and positions. (District Ex. 16 and 21).

27. On March 11, 1991, the School Board reviewed the recommendations of the administration for discontinuance of positions and programs. Among the recommendations for discontinuance made by the administration were discontinuance of one FTE counseling position, one FTE English position, one social studies position, one physical education position and reduction and reassignment of administrators.

1. Reduce one FTE kindergarten position.
2. Reduce one first grade position - nonrenewal contract
3. Reduce three Indian fine arts positions
4. Two FTE high school English positions
5. Two FTE high school social studies positions
6. One FTE high school counseling position
7. One FTE physical education position
8. Three seventh time high school vocational welding positions.

In addition to the teaching positions, the Board also passed a resolution discontinuing one assistant high school principal high school position due to financial circumstances of the School District. (District Ex. 24). The discontinued programs and positions directly impact upon the placement on ULA of the affected teachers in this proceeding.

29. The proposed placement on ULA of the affected teachers was due primarily to the financial limitations of the School District rather than upon a lack of pupils.

#### The\_School\_District's\_Indian\_Preference\_Policy

30. In 1988 the Minnesota Legislature passed the American Indian Education Act of 1988, Minnesota Statutes Chapter 126.45 to 126.55. The American Education Act of 1988 provides the following declaration of policy:

The Legislature finds that a more adequate education is needed for American Indian people in the state of Minnesota. The legislature recognized the unique educational and culturally related academic needs of American Indian people. The legislature is also concerned about the lack of American Indian teachers in the state. Therefore, pursuant to the policy of the state to ensure equal educational opportunity to every individual, it is the purpose of sections 126.45 to 126.55 to provide for American Indian education programs specially designed to meet these unique educational or culturally related academic needs or both.

31. Minn. Stat. § 126.501 of the American Indian Education Act of 1988 provides the following with respect to recruiting and retaining Indian teachers:

This section applies to a school board of a school district in which there are at least ten American Indian children enrolled. The school board shall actively recruit teacher applicants who are American Indian from the time it is reasonably expected that a position will become available until the position is filled or September 1, whichever is earlier. Notwithstanding section 125.12, subd. 4, 6a or 6b, 125.17, subd. 3 and 11, any other law to the contrary, or any provision of a contract entered into after May 7, 1988, to the contrary, when placing a teacher on unrequested leave of absence, the board may retain a probationary teacher or a teacher with less

seniority\_in\_order\_to\_retain\_an\_American\_Indian\_teacher.  
(emphasis added)

32. On March 4, 1991 the Board of Education of the School District adopted a policy pursuant to Minn. Stat. § 126.501, providing that in placing any teacher or teachers on ULA that it would retain, wherever possible, American Indian teachers. This policy is referred to as the "American Indian Teacher Preference and Retention Policy." (District Ex. 22).

33. The School District's seniority list shows that it has 105 teachers, 19 of whom are American Indians. Of the 19 American Indian teachers nine are licensed to teach regular subjects. The remaining ten are licensed to teach American Indian language and culture or Indian fine arts. Seven of the nine Indian teachers holding regular teaching licenses have been hired since 1988. (District Exs. 14-15).

34. The School District also has an Indian teacher training program for members of the Red Lake Band of Chippewa Indians with the goal of hiring graduates of the program as School District teachers. (District Ex. 22).

35. The School District's American Indian Teacher and Retention Preference Policy is not part of the negotiated plan between the School Board and the exclusive bargaining representative of the teachers. The teachers current collective bargaining agreement does not give American Indian teachers preference in retaining a job during lay off. Minn. Stat. § 126.501 does not require the School District to negotiate an Indian preference policy with the exclusive bargaining representative of School District teachers, nor must the policy be consistent with the School District teacher collective bargaining agreement entered into after May 7, 1988.

James\_Lasley

36. James Lasley has acquired continuing contract rights with the School District for purposes of seniority rights, his date of employment is August of 1977 and his seniority number is 33. (District Ex. 14 and 15).

37. Lasley is licensed and qualified to teach welding. He has no other teaching license. He commenced working for the School District in 1975.

38. Lasley is a Cree Indian and is not a member of the Red Lake Band of Chippewa Indians.

39. During the 1990-91 school year, Lasley taught six periods of welding. He taught arc welding, beginning welding and advanced welding. There were 24 students in his six classes. Lasley is the only teacher in the high school teaching welding.

40. Based upon the collective bargaining agreement, Lasley is paid \$32,000 per year. The School District's determination to decrease the welding

position from full-time to 4/7 time will save the School District approximately \$13,715 per year. (See School District Ex. 5).

41. No probationary teacher has been retained by the School District in any position for which Lasley is licensed. (District Ex. 14 and 15).

42. The decrease in the welding position from full-time to 4/7 time will allow Lasley to continue teaching welding to approximately the same number of students that he taught during the 1990-91 school year.

43. The decrease in the welding position from full-time to 4/7 time will reasonably result in financial savings for the School District without unduly adversely affecting educational opportunities for the students.

Eldon\_Winge

44. Eldon Winge has acquired continuing contract rights with the School District and his date of employment for seniority rights purposes is June 21, 1973 which is consistent with his first day of employment with the School District. (District Ex. 14 and 15).

45. Winge is presently employed as a high school guidance and counseling teacher. He is licensed in guidance and counseling and in science-all 7-12. (District Ex. 15).

46. In his guidance and counseling position, Winge handles career development, standardized and post secondary admissions testing, post secondary options program, follow up on students, Upward Bound Program, Talent Search Program, student financial aid, post secondary planning, personal problems counseling, consultant for standardized testing District-Wide, and other related duties.

47. No other person in the teachers bargaining unit is licensed in guidance and counseling. (District Ex. 14 and 15).

48. The following teachers, licensed in science, are being retained by the School District, and are probationary teachers or have less seniority than Winge:

Ruby Petrusck, biological science, seniority date 7/31/84.

Karen Good, earth science, seniority date 8/22/88.

49. Winge suffers from allergies and states that he is unable to teach science for this reason. Winge advised the School District that he did not wish to exercise bumping rights against Ruby Petrusck because she has cancer and a lay off would leave her with no medical insurance. (Testimony of Eldon Winge).

50. Karen Good is an Indian teacher and an enrolled member of the Red Lake Band of Chippewa Indians. If Winge were assigned to teach scienc

51. The School District has a "Homebound" position which is available for the 1991-92 school year due to the nonrenewal of the contract of the probationary teacher who held the position for the 1990-91 school year. (District Ex. 14, 15 and 25). The Homebound position requires any teacher licensure.

52. The School District also has an opening for a teacher in the "Project Preserve" position. Winge testified that he would accept assignment as a Project Preserve Coordinator. The School District requires licensure in Indian language and culture for Project Preserve Coordinator. (See District Ex. 15, testimony of E. Kroenke).

53. Winge does not hold teacher licensure in Indian language and culture.

He is qualified for the Homebound position but is not qualified for the Project Preserve position.

54. The placement of Winge on ULA and the termination of his counseling position will save the School District \$28,500. (Teacher Ex. 4).

55. Stewart Desjarlait is the Director of Student Services for the School District. He is an American Indian. The School District proposes to transfer some of the counseling duties of Winge to Desjarlait during the 1991-92 school year. Other non teaching duties such as admissions testing and financial aid will be transferred to school administrators.

56. It was the intent of the School Board in its resolutions to discontinue those positions which would have the least impact on the delivery of education to children. Because the guidance and counseling position does not involve the direct delivery of education to children, the elimination of the position will result in financial saving for the District without unduly adversely affecting educational opportunities for the students.

Raymond\_Brown

57. Raymond has acquired continuing contract rights with the School District. Brown has been employed by the School District since August 10, 1987 which date corresponds with his date of employment for seniority rights purposes. (District Exs. 14, 15). Brown is not a member of the Red Lake Band of Chippewa Indians nor is he an American Indian.

58. Brown is qualified to teach and is licensed in the fields of social studies, health and physical education and coaching. (District Exs. 14 and 15).

59. Brown does not have continuing contract rights in coaching as coaching in the School District is extracurricular and exempted under the master agreement. (District Ex. 5, Schedule C and Article VII).

60. There are three probationary teachers in the District who are being retained under the School Districts Indian teacher retention policy set forth in Finding 32 above and who are licensed in the same fields as Brown. These positions are as follows:

Douglas Desjarlait, physical education, seniority date 7/31/89.

Patricia Doro Goodwin, history and sociology, seniority date 8/14/89.

Ramona Dreher, social studies, seniority date 8/13/90.

Patricia Doro Goodwin is an American Indian and an enrolled member of the Minnesota Chippewa Tribe. Douglas Desjarlait and Ramona Dreher are American Indians and are members of the Red Lake Band of Chippewa Indians. (District Exs. 26-30).

61. The teacher-student ratio in the School District's high school has historically averaged one to fifteen or less. With the discontinuance of positions as proposed by the School District, the School District will be unable to maintain the one to fifteen ratio. It is estimated that the teacher-student ratio for the 1991-92 school year will be one to twenty-five. The School Districts financial limitations will not permit a continuance of the low teacher student ratio historically maintained by the School District. (Testimony of E. Kroenke). There is no factual evidence in the hearing record to support a finding that the increase in teacher-student ratio in the high school resulting from the discontinuance of the physical studies positions will unduly adversely affect the quality of education for the students. The discontinuance of the physical education and social studies positions will result in financial savings for the School District.

Richard\_Phillips

62. Richard Phillips has acquired continuing contract rights with the School District. His date of employment for seniority rights purposes is August 11, 1986.

63. Phillips is licensed and qualified to teach English and language arts 7-12 and coaching 7-12.

64. Phillips does not have continuing contract rights in coaching as coaching in the School District is extracurricular and exempted under the master agreement. (District Ex. 5, Schedule C and Article VII).

65. Phillips' assignment for the 1990-91 school year is assistant high school principal and this position has been discontinued by the Board for the 1991-92 school year. He retains bumping rights in the teachers bargaining unit.

66. No probationary teacher has been retained by the School District in any position for which Phillips is licensed. (See District Ex. 15).

67. No tenured teacher with less seniority than Phillips has been retained by the District in any positions for which Phillips is licensed. (District Ex. 15).

68. The discontinuance of the assistant high school principal position and the English positions has not been shown to unduly adversely affect the quality of education for the students. It will result in financial savings for the District.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. The School Board of Independent School District No. 38, Red Lake, Minnesota and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 125.12 and 14.55.

2. The requests for hearing in this matter were timely filed and all substantive and procedural requirements of law or rule have been substantially fulfilled. Any technical violations with respect to the Notice of Hearing have been waived or are non-prejudicial.

3. The master agreement between the School District and the teachers bargaining unit effective December 4, 1989, does not contain a negotiated plan for the placement of teachers on unrequested leave of absence.

4. Pursuant to Minn. Stat. § 125.12, subd. 6b, the School Board may place on unrequested leave of absence without pay or fringe benefits as many teachers as may be necessary because of discontinuance of position, lack of pupils, financial limitations, or merger of classes caused by consolidation of districts.

5. The School District has the burden to establish by a preponderance of the evidence the necessity to place on unrequested leave of absence the teachers due to discontinuance of position, lack of pupils, financial limitations or merger of classes caused by consolidation of districts.

6. The School District has established that it has serious financial limitations which make it necessary for it to discontinue the following positions:

- One assistant high school principal
- One high school counseling position
- 3/7 FTE high school vocational welding position
- Two FTE English positions
- Two FTE social studies positions

One FTE physical education position

7. The School District has failed to establish that it is necessary to discontinue positions because of lack of pupils or merger of classes caused by consolidation of districts.

8. The School District's American Indian Teacher Preference and Retention Policy is consistent with the American Indian Education Act of 1988, Minn. Stat. § 126.46 through 126.55.

9. The School District's American Indian Teacher Preference and Retention Policy does not constitute racial discrimination nor does it violate the fourteenth amendment

10. The School District's Indian Preference and Retention Policy constitutes a positive action program to combat discrimination pursuant to Minn. Stat. § 126.55.

11. The proposed placement on unrequested leave of absence of James Lasley is proper as no tenured teacher with less seniority than Mr. Lasley has been retained by the District in any position for which Lasley is licensed and the decrease in the welding position from full-time to 4/7 time will reasonably result in financial saving for the District without unduly adversely affecting educational opportunities for the students.

12. The proposed placement on unrequested leave of absence of Eldon Winge is appropriate because he has advised the School District that he is unable to teach science because of allergies and does not wish to exercise bumping rights against a less senior teacher, Ruby Protusck.

13. Although Karen Good is a probationary teacher, she is an American Indian teacher and an enrolled member of the Red Lake Band of Chippewa Indians. Notwithstanding, the fact that Karen Goode is a probationary teacher and Eldon Winge has more seniority than she, it is appropriate for the School District to retain Karen Good pursuant to its American Indian Teacher Preference and Retention Policy consistent with Minn. Stat. § 126.501.

14. Eldon Winge is appropriately licensed and qualified to fill the Homebound position available in the School District for the 1991-92 school year.

15. Eldon Winge is not qualified for the position of Project Preserve Coordinator within the School District as he does not have the required licensure in American Indian language and culture.

16. The proposed placement on unrequested leave of absense of Raymond Brown is appropriate notwithstanding the fact that there are three teachers with the School District that have less seniority than Raymond Brown because all three of the teachers with less seniority are American Indian teachers and may be retained pursuant to the School District's American Indian Teacher Preference and Retention Policy consistent with Minn. Stat. P 126.501.

17. The proposed placement on unrequested leave of absense of Richard Phillips from the position of assistant high school principal is appropriate as there is no tenured teacher with less seniority than Phillips who has been retained by the School District in any position for which Phillips is licensed.

He retains bumping rights in the teachers bargaining unit should he so choose to exercise those privileges.

18. The discontinuance of the positions will not unduly adversely affect the quality of education for the students and will result in financial savings for the School District.

19. The Conclusions are made for the reasons set forth in the following Memorandum.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the School Board of Independent School District No. 38, Red Lake, Minnesota affirm its decision to place James Lasley, Eldon Winge, Raymond Brown, and Richard Phillips on unrequested leaves of absense.

Dated: June 19\_\_, 1991.

Phyllis\_A.\_Reha\_\_\_\_\_

PHYLLIS A. REHA  
Administrative Law Judge

Court Reported: Edwin V. Carlson  
Certified Court Reported  
P.O. Box 443  
Bemidji, MN 56601  
(218) 751-4116

MEMORANDUM

## Financial\_Limitations

Minnesota Statutes section 125.12, subd. 6b permits school boards to place as many teachers on unrequested leave of absence as may be necessary because of discontinuance of position, lack of pupils and financial limitations. The Red Lake School Board passed resolutions with respect to the proposed placem

Even though the School District did not demonstrate lack of pupils as a reason to place the teachers on ULA, it did provide ample evidence to establish its actions were reasonable due to the School District's financial limitations.

Existence of a single statutory ground under Minnesota Statutes section 125.12, subd. 6b is sufficient to support the placement of educational employees on ULA.

*Bates v. Independent School District No. 482, Little Falls*, 379 N.W.2d 239, 242 (Minn. Ct. App. 1986). Indeed, the parties stipulated at the hearing to the fact that the Red Lake School District is in severe financial difficulty because of mismanagement and misappropriation of funds by past school boards and administration. As the Findings of this report reflect, even though the School District admittedly does not have accurate and adequate accounting records concerning its spending of funds, there is no serious dispute that there is a serious deficit in the School District's general fund balance as of June 30, 1990 and its deficit for the year ending June 30, 1991 is expected to be even worse. It is undisputed that the School District is in statutory operating debt under Minn. Stat. § 121.914 (District Ex. 8, page 43); and that the School District was notified on January 14, 1991 that its accounts at the Northern National Bank were overdrawn and credit which had been applied for was being denied. (District Ex. 9). It is also undisputed that in January of 1991 the School District received notice from the Minnesota Department of Education that it was in violation of expenditure limitations. (District Ex. 10). Accordingly, even though the School District is unable to provide accurate projections of revenues for the 1991-92 school year, there is ample evidence upon which to base a conclusion that the School District has severe financial limitations, and must make significant budget reductions, including teacher lay-offs, in an effort to begin to deal with its financial crisis. The Administrative Law Judge has concluded, therefore, that the School District has proved by a preponderance of the evidence the existence of statutory grounds for placement of these teachers on ULA.

## Indian\_Preference

In 1988, the State Legislature enacted the American Indian Education Act

of 1988, Minn. Stat. §§ 126.45 to 126.55. The statute applies to Minnesota school districts in which there are at least ten American Indian children enrolled. An "American Indian child" mean any child, living on or off the reservation, who is enrolled or eligible for enrollment in a federally recognized tribe. Minn. Stat. § 126.47, subd. 2. Independent School District

No. 38 is a public school district located on the Red Lake Indian Reservation with a current enrollment of 1,004 students, all of which are American Indian children. In the declaration of policy, the State Legislature stated as follows:

The legislature finds that a more adequate education is needed for American Indian people in the state of Minnesota. The legislature recognizes the unique educational and culturally related academic needs of American Indian people. The legislature also is concerned about the lack of American Indian teachers in the state. Therefore, pursuant to the policy of the state to ensure equal educational opportunity to every individual, it is the purpose of sections 126.45 to 126.55 to provide for American Indian education programs specially designed to meet these unique educational or culturally related academic needs or both. (Minn. Stat. § 126.46).

Minn. Stat. § 126.501 requires the school boards of a school district in which there are at least ten American Indian children enrolled to actively recruit teacher applicants that are American Indian and provides, with respect to retaining Indian teachers the following:

. . . Notwithstanding section 125.12, subdivi

Consistent with the provisions of the Indian Education Act of 1988, on March 4, 1991 the School Board adopted a policy which provided that when placing any teacher or teachers on unrequested leave to retain, wherever possible, American Indian teachers. In the policy, the School Board provided its rationale for the Indian preference to be that Indian students in the District "have an unique culture and heritage and learn best from teachers who share their own culture and heritage, and will greatly benefit from having persons from their own culture and heritage present in the school as role models, . . .".

The School District and the teachers have entered into a master agreement within the School District, the effective date of which is December 4, 1989. The contract does not contain a negotiated plan for the placement of teachers on unrequested absense but does contain language relating to unrequested leave which is essentially identical to the provisions of Minn. Stat. § 125.12, subd.

6b. Notwithstanding the language of the contract, pursuant to Minn. Stat. § 126.501, the School District may retain a probationary teacher or a teacher with less seniority in order to retain an American Indian teacher. Accordingly, pursuant to the language of Minn. Stat. § 126.501, quoted above, the Board was free to disregard any contract language which would have prohibited the School District from retaining an American Indian teacher over

non-Indian teacher.

Raymond Brown is the only teacher of the affected teachers in this proceeding who is directly impacted by the School District's Indian Preference Policy. There are three teachers who have less seniority than Raymond Brown that the School District proposes to retain for the 1991-92 school year in subject areas for which Brown is licensed. These teachers are Douglas Desjarlait, Patricia Goodwin, and Ramona Dreher. All three teachers are American Indians, are member of the Red Lake Band of Chippewa Indians and live on the Red Lake Indian Reservation. There is further testimony that all three of the retained teachers would provide the needed role models for the Indian students. There is testimony of the School District that Raymond Brown possesses none of these attributes.

The representative for Raymond Brown has argued that the placement of Brown on ULA because he is a non-Indian is racial discrimination which violates state and federal laws and the fifth and fourteenth amendment of the United States Constitution which guarantees equal protection. Minn. Stat. §126.55 provides the construction of the Indian Education Act of 1988 as follows:

Nothing in the provision of sections 126.45 to 126.55 shall be construed to violate the provisions of section 127.08 [relating to the improper classification of pupils with reference to race, color, social position or nationality] or chapter 363 [relating to unfair discriminatory practices]. Programs and activities pursuant to sections 126.45 to 126.55 shall be deemed to be positive action programs to combat discrimination.

While recognizing the construction of the American Indian Education Act of 1988, the representative of Raymond Brown argues that this statute and others similar to it throughout the United States has been modified by the Supreme Court decision in Wygant v. Jackson Board of Education, 476 U.S. 267, 90 Law. Ed.2d 260 (1986), rehearing denied June 30, 1986, see 478 U.S. 1014, 106 Sup. Ct. 3320. In Wygant the United States Supreme Court, in a five to four decision struck down an affirmative retention policy of a school board which extended preferential protection against lay-offs to some minority employees. The Supreme Court, Justice Powell, for the plurality, held that the school board's policy of extending preferential protection against lay-offs to some employees because of their race violated the fourteenth amendment. The court further held

The teacher's argument that the Wygant case overrules the Indian Education Act of 1988 fails for a number of reasons. First, the Wygant case was decided in 1986. The Indian Education Act of 1988 was passed by the 1988 legislature following the holding in Wygant. It must be presumed that the state legislature would not adopt an unconstitutional law. Accordingly, the teacher is essentially asking the Administrative Law Judge to rule on the constitutionality of a state statute. As a general rule, neither an

administrative law judge or an administrative agency can declare unconstitutional a state statute. *Wronski\_v.\_Sun\_Oil\_Company*, 108 Mich. App. 178, 310 N.W.2d 321 (1981); *Starkweather\_v.\_Blair*, 245 Minn. 371, 394-95, 71 N.W.2d 869, 884 (1955); *First\_Bank\_v.\_Conred*, 350 N.W.2d 580 (N.D. 1984).

The

power to find a statute unconstitutional vests with the judicial branch of government. *Johnson\_v.\_Robinson*, 415 U.S. 361, 368 (1974); *Meelend\_v.\_Clearwater\_Memorial\_Hospital*, 257 N.W.2d 366, 368 (Minn. 1977). While it is not permissible to declare a statute unconstitutional, it is permissible for the Administrative Law Judge to determine a constitutional question in the interpretation of a statute or its application to particular facts, taking into

account relevant judicial decisions. *Smith\_v.\_Willis*, 415 So.2d 1331, 1336 (Fla. Dist. Ct. App. 1982);

*Jackson\_County\_Education\_Association\_v.\_Grass\_Lake*

*Community*, 95 Mich. App. 635, 641, 291 N.W.2d 53, 56 (1980); *Petterssen\_v.\_Commissioner\_of\_Employment\_Service*, 306 Minn. 542, 543, 236 N.W.2d 168, 169 (1975). Notwithstanding that the Administrative Law Judge may not make a declaration of unconstitutionality, she did permit the parties to introduce evidence relevant to unconstitutionality and allowed the parties to argue the application of the statute to the facts in this case. See, *Beck, Bakken & Muck, Minnesota\_Administrative\_Procedure*, section 8.5 and 10.2.1 (Butterworth 1987).

The Administrative Law Judge has analyzed the arguments of the parties, has reviewed cases barring "reverse discrimination" and has reviewed the holdings in *Wygant* and other cases to consider whether the application of the American Indian Education Act of 1988 to the facts in this case is unconstitutional. It is the opinion of the Administrative Law Judge that the *Wygant* case and other cases barring reverse discrimination have no application

to tribal Indians. It is well settled that when special or preferential treatment is reasonable and rationally related to fulfillment of a special trust obligation to Indians, it is a permissible differentiation in a legitimate public interest rather than prohibitive racial discrimination.

The

United States Supreme Court has determined on several occasions that due to their unique legal status, employment and other preferences may be granted to American Indians without violating equal protection of the laws and other constitutional prohibitions.

The leading case in this regard is *Morton\_v.\_Mancari*, 94 Sup. Ct. 2475 (1974). In *Mancari*, non-Indian employees of the United States Bureau of Indian

Affairs (BIA) challenged a federal statute which accorded Indians employment preferences in hiring and training as unlawful racial discrimination which deprived them of property without due process of law under the fifth amendment.

The Supreme Court, tracing the historical unique status of Indians stated:

Contrary to the characterization made by appellees, this preference does not constitute "racial discrimination". Indeed it is not even a "racial" preference. Rather it is an employment criterion reasonably designed to further the cause for Indian self government and to make the BIA more responsive to the needs of constituent groups. It is directed to participation by the governed in the governing

agency. (94 Sup. Ct. at 2484).

The Supreme Court cited other occasions where it had specifically up

The United States Supreme Court recently reaffirmed the principle  
premise  
of the Mancari case in *Duro\_v.\_Reina*, 110 Sup. Ct. 2053, 2063 (1990) when it  
cited to Mancari as follows:

That Indians are citizens does not alter the federal  
government's broad authority to legislate with respect to  
enrolled Indians as a class, whether to impose burdens or  
benefits.

Mancari has been consistently followed by other courts in deciding cases  
challenging Indian preferences as racially discriminatory. In *St.\_Paul  
Intertribal\_Housing\_Board\_v.\_Reynolds*, 564 F.Supp. 1408, (D. Minn. 1983) the  
United States District Court for Minnesota held that state action for the  
benefit of Indians is also protected from challenge under the equal  
protection  
clause of the fourteenth amendment or civil rights statutes. In *Reynolds* the  
state of Minnesota and the City of St. Paul agreed to provide funds for a low  
income housing project which would be open only to American Indians. The  
Court  
rejected the claim that the state's participation violated the equal  
protection  
clause or its civil rights statutes (*Reynolds*, supra, 564 F.Supp. 1408,  
1412).  
Judge Diana Murphy held that special benefits may be accorded to Indians on  
or  
off reservations and to individual Indians as well as to tribes. With  
respect  
to the state action at issue the Court stated as follows:

The Minnesota legislature has expressed its clear  
intention to benefit urban Indians in the Minnesota Urban  
Indian Housing Act, Minn. Stat. 462A.07, subd. 15. This  
special treatment is rationally related to government's  
unique obligation to the Indians and thus falls under the  
trust doctrine. (564 F.Supp. at 1413).

The Court further stated that statutes for the benefit of Indians must  
be  
liberally construed in their favor. (*Reynolds*, supra at 412). However, the  
Court did stress that there must be an expression of legislative intent to  
benefit Indians in such manner. (*Reynolds*, supra at 1411). In this case,  
there is a clear expression of legislative intent to benefit Indians in the  
language of the American Indian Education Act of 1988 and in particular Minn.  
Stat. § 126.501.

Nor can it be logically argued that the *Wygant* case decided in 1986 has  
overruled the Mancari case which was decided ten years earlier. In *U.S.\_v.  
Juvenile\_Male*, 864 F.2d 641 (9th Cir. 1988), the 9th Circuit upheld  
application  
of a federal criminal statute against equal protection claims. Citing  
Mancari,  
supra, the Court stated that because of the difference in treatment between

Indians and non-Indians arose from political membership in a tribe rather than from race, no equal protection violation occurred. U.S.\_v.\_Juvenile\_Male, was decided two years after the Wygant case and has not been overruled by the Supreme Court.

In Livingston\_v.\_Ewing, 601 F.2d 110, (10th Cir. 1979) non-Indians challenged a state policy permitting only Indians to sell their handmade goods at a historic building by claiming that the policy violated the equal protection clause of the fourteenth amendment since it was a classification based on race. The Court found the state action to be an employment practice and held that the policy was not reverse discrimination.

Title VII Civil Rights Act of 1964 (Equal Employment Opportunity Act), which is the principle federal measure protecting employees against discrimination contains an exception for according employment preferences to Indians on or near Indian Reservations. This provision which is found at 42 U.S.C. 2000e-2(i) provides as follows:

Nothing contained in this title shall apply to any business or enterprise on or near an Indian Reservation with respect to any publically announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or

In Livingston, the Court held that 42 U.S.C. 2000e-2(i), quoted above, together with the Supreme Court's comments regarding 42 U.S.C. 2000e-2(i) in Mancari, supra provided strong support for a conclusion that the exemption of 42 U.S.C. 2000e-2(i) applied and permitted the preferential treatment. 601 F.2d 1110 at 1114-15.

This and other cases upholding Indian preferences against claims of unlawful discrimination are contained in the School District's brief at page 7.

In none of these cases has the Court applied the strict scrutiny and other traditional equal protection analysis that would have been required had the classification not involved Indians.

Based upon this analysis, it is concluded that the Wygant case has no application to the facts of this case. The School District's Indian Preference Policy and its action in proposing to retain Indian teachers with less seniority than Raymond Brown is lawful. The policy was promulgated under the state statute permitting it. The legislature's adoption of Minn. Stat. §126.501 was an expression by the legislature of the special trust obligation recognized by the Supreme Court in Mancari and as it applies to state statutes in Reynolds. The American Indian Education Act of 1988 evidences an adoption by the state legislature of a longstanding federal policy of enhancing Indian self determination and permitting Indian people to serve their own as much as possible. The School District's Indian Preference Policy does not constitute invidious racial discrimination in violation of the fifth or fourteenth amendments but is reasonable and rationally designed to further Indian

self-government. Indeed, as Justice Blackmun speaking for the Court in Mancari stated:

If Indian preference laws, which were derived from historical relationships and are explicitly designed to help only Indians, were deemed invidious racial discrimination, 25 U.S.C. in its entirety would be effectively erased and the government's commitment to Indians would be jeopardized. (417 U.S. at 2483-84).

Here, the special treatment of Indians can be tied rationally to the fulfillment of the government's unique obligation toward Indians. Accordingly such legislative judgments should not be disturbed. (417 U.S. at 2484-85).

Whether\_the\_School\_Board\_Properly\_Placed\_James\_Lasley,\_Eldon\_Winge\_and\_Richard\_Phillips\_on\_Unrequested\_Leaves\_of\_Absence.

Counsel for James Lasley argues that it would be arbitrary and unreasonable to do away with any portion of Lasley's position in welding. Lasley testified at the hearing that he has been making an effort to recruit additional students for his program and has 39 students signed up for welding for the 1991-92 school year. If 24 students constituted a full load during the 1990-91 school year, it is argued, that certainly a 62.5 percent increase should constitute a full load for the 1991-92 school year. (See, Teachers Brief at page 10). The testimony at the hearing shows that Lasley's actual class enrollment for the 1990-91 school year was 24. However, actual class attendance of enrolled students was poor. The reduction of Lasley's teaching time by 3/7 of the position will allow the School District to accommodate the same number of students that took welding for the 1990-91 school year. The School District recognizes that if the preregistration numbers resulting from Lasley's student recruitment for his course were to materialize the School District may consider adding additional classes or assigning additional space for welding classes. However, it has not been shown that the decrease in the welding position from full-time to part-time would unduly adversely affect the education of the students within the School District. Since there are no probationary teachers or teachers with less seniority licensed in welding that have been retained by the School District, the School District may place Lasley on ULA for 3/7 of the po

The School District has discontinued the counseling position occupied by Eldon Winge. Winge is licensed in counseling and science. The School District has offered Winge the Homebound teaching position which will be vacant next year. Acceptance of the Homebound teaching position would result in no reduction in salary to Winge. Winge is qualified to perform the duties of the Homebound teacher as it requires no specialized teaching license and a general teaching license is adequate. Winge has declined the position of Homebound teaching. Instead, he desires the position of Project Preserve Coordinator.

The Project Preserve Coordinator position is an Indian Culture Program. Winge is not qualified as an Indian culture teacher. Winge is licensed in counseling and science. The School District has other teachers with less seniority than Mr. Winge on its staff who are being retained. The teacher with the least seniority license is Karen Good. Karen Good is an American Indian teacher and is a member of the Red Lake Band of Chippewa Indians. Normally, Winge should be retained as more senior than Karen Good. However, the School District has stated that it would exercise its Indian Preference Policy to retain Karen Goode because of her status as an American Indian. However, Winge has stated that he cannot teach science because of his allergies which disable him from teaching science. Accordingly, the issue of Indian preference is not directly involved in Mr. Winge's factual circumstances.

Counsel for Winge submitted several documents with its brief in support of teachers. These documents were not available at the hearing to scrutinize during direct or cross-examination. Minn. Stat. § 125.12 subd. 9 and 10 provide that a decision of the school board must be based upon competent evidence "in the record." Rules of the Office of Administrative Hearing define the contents of an administrative law judge's report which, although not specifically required by Minn. Stat. § 125.12 provides a specific definition of evidence which might be considered. Minn. pt. 1400.8100, subp. 1 provides as follows:

Based on record. No factual information or evidence which is not a part of the record shall be considered by the judge or the agency in the determination of a contested case.

Minn. pt. 1400.7800, subp. j provides:

The record of the contested case proceeding shall be closed upon receipt of the final written memorandum, transcript, if any, or late filed exhibits which the parties and the judge have agreed should be received into the record, whichever occurs latest which\_the\_parties\_and\_the\_judge\_have\_agreed\_should\_be\_received\_into\_the\_record.

The late filed exhibits which have been submitted by the teachers were not available at the hearing; were not agreed upon to be accepted as late filed exhibits by the parties or the judge; and were not subject to cross-examination or written or oral argument. It would be improper for the Administrative Law Judge to consider these documents.

One of the documents submitted by the teachers is purportedly a memorandum circulated to the School Board indicating that the duties of Mr. Winge would need to be reassigned. Counsel suggests that this memo establishes that

Winge's position is not actually being discontinued but reassigned. It is the Counsel's conclusion that the document indicates that the position still exists, only that it will be divided up and distributed among other positions. (Teachers Brief at page 6). It is argued that this document impeaches the testimony of the superintendent. (Teachers Brief at page 6). Even if the Administrative Law Judge were to accept the interpretation of the memo that the teacher's duties would be reassigned, it would not change the Administrative Law Judge's recommendation that the School District acted properly in recommending that Winge be placed on U

For the 1990-91 school year Richard Phillips was assigned as an assistant high school principal. He normally would retain the right to bump into a teaching position upon the discontinuance of his administrative position. See, *Evans\_v.\_ISD\_No.\_281*, 396 N.W.2d 616 (Minn. Ct. App. 1986). Phillips has continuing contract rights only in English and language arts and there are no English and language arts positions available for Phillips to bump into. The English position held by Roberta Ball was discontinued and her contract was not renewed. The only other teachers with English licensure were also licensed in special education and assigned to special education. Thus, no realignment was possible. See, *Strand\_v.\_Special\_School\_District\_No.\_1*, 392 N.W.2d 881 (Minn. 1986) requiring reasonable realignment of positions in order to place the teacher with least seniority on ULA.

As the facts in this case show, the District will still have four teachers licensed in English to serve the junior-senior high school students next year. All four of the teachers licensed in English are senior to Phillips. Four persons teaching six periods per day can reasonably accommodate these students without unduly adversely affecting the educational opportunity for the students. In summary, Phillips may properly be placed on unrequested leave of absence.

P.A.R.